PUBLIC MATTER – DESIGNATED FOR PUBLICATION

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REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **MARK HAMILTON SALYER**, Petitioner for Reinstatement.	))))))	**02-R-15797** **OPINION ON REVIEW**

The State Bar asks us to review the decision of a hearing judge recommending the reinstatement of petitioner Mark H. Salyer, who resigned with charges pending in 1987. The State Bar contends that petitioner has not established his rehabilitation from the misconduct related to his methamphetamine addiction. The State Bar also asserts that petitioner has not made timely restitution and that petitioner's failure to comply with rule 955 of the California Rules of Court should preclude his reinstatement. Finally, the State Bar maintains that the hearing judge erred in denying the State Bar's motion to have petitioner submit to an independent medical examination.

Our independent review of the record establishes that although petitioner's self-created recovery program is untraditional, it has nevertheless given petitioner the ability to abstain from methamphetamine use for over seventeen years. We further note petitioner's record of rehabilitation is not a perfect one; however, perfection is not what is required for reinstatement. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.) With minor modifications, we adopt the hearing judge's factual findings and endorse her recommendation that petitioner be reinstated to practice law in California.

I. Factual and Procedural Background

A. Petitioner's Background and History of Substance Abuse

Petitioner was admitted to the practice of law in California on April 13, 1978, and had a general practice as a solo practitioner from 1978 through 1985 in the small, close-knit legal community surrounding Marysville, California. Petitioner also worked with the Yuba County Public Defender's Office on a part-time basis beginning in 1985.

Petitioner has a long history of substance abuse beginning as early as 1966 when he started smoking marijuana recreationally in high school. In 1967 he used physician-prescribed amphetamines for the purpose of weight loss and began using non-prescription amphetamines in 1969 while attending junior college. Petitioner's use of non-prescription amphetamine continued through college and law school.

In 1980 petitioner began using methamphetamine as a means of coping with self-esteem issues, and as his practice grew, methamphetamine became his drug of choice when dealing with the stress of operating his practice and meeting responsibilities to his six children and spouse. As his use increased, petitioner came to believe that he lacked the ability to be a successful husband, father, and lawyer without the methamphetamine.

Petitioner hid his drug use from his spouse and children, but by 1982 petitioner realized he was addicted to methamphetamine. Petitioner confessed his addiction to his wife and repeatedly attempted to stop his drug use but could not do so for longer than a few months before resuming use. By 1984 petitioner was using an eighth of an ounce of methamphetamine daily in conjunction with alcohol which he used to "take the edge off" the drug. After several unsuccessful attempts to terminate use on his own, petitioner admitted himself to an in-patient chemical abuse treatment center in June 1985.

B. Petitioner's Misconduct

We must examine petitioner's current evidence of rehabilitation in light of the misconduct which led to his resignation. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) Within a few years of his introduction to methamphetamine, petitioner's use had progressed to the point that it seriously affected his demeanor and ability to practice law.[1] By August 1982 petitioner's need for the drug was so out of control that he began diverting funds from a client account to finance his methamphetamine addiction.[2] By November 1983 petitioner depleted the account after misappropriating $52,430.46. In order to hide his wrongdoing, petitioner used his own funds to pay the client's expenses, but by March 1984, after depleting his personal funds, petitioner informed the client's conservator that there were no more funds in the account due to his mismanagement.

In July 1985, petitioner sent a letter to the State Bar admitting to ethical violations regarding his representation in the client matter.

Petitioner was charged and pled guilty to a felony violation of Penal Code section 506 (embezzlement). In October 1986, the superior court suspended imposition of a two-year prison term and placed petitioner on probation for five years with conditions including, inter alia,

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[1]Petitioner's behavior was abrasive and he would become irritable for no apparent reason. During a criminal trial, petitioner was unable to ask focused questions germane to the proceedings and was observed making facial expressions uncontrollably, leading the trial judge to comment that he believed petitioner was taking drugs.

[2]In March 1982 petitioner successfully negotiated a policy limit settlement for Bryan Poe who was severely brain-damaged due to an automobile accident. A conservatorship was established for Bryan, with his mother, Jeanne Poe, appointed as conservator and petitioner named as attorney of record for the conservatorship. Jeanne Poe requested that petitioner administer the remaining settlement proceeds in order to pay Bryan's recurring monthly medical bills and the funds were placed in an unblocked trust account with petitioner solely authorized to make withdrawals.

restitution in the amount of $26,236.89,[3] prohibition of possession or use of any controlled substances not prescribed by a physician, and submission to chemical testing for the detection of alcohol/drug use.[4]

Three months into his probationary term, petitioner suffered a relapse, and on January 15, 1987, submitted a urine sample which tested positive for the presence of methamphetamine. A week later law enforcement personnel arrested petitioner at his home, and, after conducting a search of the premises, seized 1.8 grams of a white powder from petitioner's bedroom which was later determined to be methamphetamine.

Petitioner tendered his resignation with charges pending which the Supreme Court accepted, effective February 20, 1987. He had no prior record of discipline at that time.

Petitioner was charged with and pled guilty to a felony violation of Health and Safety Code section 11377 (possession of methamphetamine) and his probation was revoked in the embezzlement matter. In March 1987 petitioner was sentenced to two years in state prison on the original embezzlement charge as well as two years in state prison on the possession conviction to run concurrently with the sentence imposed in the embezzlement matter.

C. Petitioner's Rehabilitation

As noted *ante*, in June 1985 petitioner voluntarily admitted himself into a drug rehabilitation program. Specifically, petitioner participated in a month-long in-patient treatment plan at Starting Point rehabilitation center in Orangevale, California. Following in-patient treatment, petitioner attended weekly meetings for approximately six months as part of Starting

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[3]This figure ($22,341.47 + $3,895.42) represents the net amount in principal and interest petitioner owed the conservatorship of Bryan Poe after crediting petitioner $30,088.99 in conservatorship expenses which petitioner paid with his own funds.

[4]Although petitioner was required to submit to alcohol/drug testing, petitioner's probation conditions did not proscribe his use of alcohol or require him to stay away from places or persons serving alcohol.

Point's after-care program consisting of group counseling based on the twelve-step principles of Alcoholics Anonymous (A.A.).[5]

Petitioner last used methamphetamine in January 1987. Notwithstanding petitioner's participation in Starting Point in 1985, it was not until petitioner's incarceration in March 1987, that his rehabilitation program began in earnest. While in county jail awaiting transport to state prison, petitioner began a physical fitness program involving, walking, jogging, and weight lifting. Petitioner continued this physical fitness program during his imprisonment and thereafter upon his release.[6]

After his release from prison in 1988, petitioner once again participated in Starting Point's after-care program, attending weekly meetings for approximately six weeks. At this time, petitioner also began attending A.A. meetings. Petitioner consumes an alcoholic beverage approximately once a week and emphasizes that his attendance at A.A. meetings is not due to any problem with alcohol. Rather, petitioner attends A.A. meetings because he is a recovering methamphetamine addict who finds a level of wisdom in A.A. meetings, especially with his home group in Marysville, that provides a greater benefit to him than Narcotics Anonymous (N.A.) meetings do.[7]

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[5]Alcoholics Anonymous is a fellowship of men and women who assist one another to stay sober. Members are encouraged to follow the "Twelve Steps" to recovery which suggest ideas and actions intended to assist members in developing healthy emotions in order to remain sober.

[6]Petitioner was placed on parole for three years after his release from prison in February 1988 and was randomly tested at least twice monthly for controlled substances during the first year of parole. All tests were negative, and petitioner was discharged from parole after the first year due to good behavior.

[7]Petitioner attended two Narcotics Anonymous meetings after release from prison but did not continue because the participants had not attained a length of sobriety which assured petitioner that continued attendance would benefit him. In contrast, attendees of A.A. meetings had lengths of sobriety spanning 20 to 35 years.

Petitioner's recovery program involves not only his physical fitness regimen, which he continues to the present, but also includes components of the A.A. twelve steps which petitioner incorporates into his daily life. Petitioner no longer regularly attends A.A. meetings but will occasionally attend such meetings monthly or every two months as a "refresher course" so that he can continue to maintain a way of life in which methamphetamine is not desirable to him. Petitioner's A.A. attendance might also increase after experiencing stressful triggers in life.[8]

Petitioner has been employed as a law clerk, contract paralegal and administrative manager since his prison release, and his performance of these services has been excellent according to the attorneys and colleagues who worked with him on a regular basis. Petitioner took reasonable steps to fully pay restitution he owed and made amends to his family,[9] which continues to be supportive and a mainstay in his life. Presently, petitioner is active in community service, exercises regularly, and conducts a daily self-evaluation in order to maintain a frame of mind less susceptible to relapse.

D. Reinstatement Proceedings

Petitioner filed his petition for reinstatement on December 4, 2002. A three day hearing commenced on December 9, 2003. Petitioner and nine witnesses, including a superior court judge and several attorneys, testified on petitioner's behalf. In addition, petitioner submitted 19 good character letters from attorneys, former employers, friends, and petitioner's spouse and children. In rebuttal, the State Bar presented an addiction expert who, while not permitted to examine petitioner, testified that petitioner is in relapse and not in recovery due to his use of

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[8]After petitioner's daughter died in an automobile accident in 1995 and while petitioner's employment required him to reside away from his family in Marysville, petitioner regularly attended A.A. meetings to relieve his sense of isolation and to share with members of the group the feelings he was experiencing.

[9]As will be discussed in greater detail, *post*, petitioner's wife divorced him after learning of his drug addiction but remarried him approximately six years later after petitioner's release from prison.

alcohol. Petitioner presented no medical evidence, expert or otherwise, attesting to his prospect of recovery from methamphetamine addiction and his risk for relapse. Instead, petitioner relied solely on his self assessment and the observations of his character witnesses.

The hearing judge filed her decision on February 25, 2004, finding that petitioner's personal recovery program was successful in keeping him off of drugs for more than seventeen years and that his use of alcohol did not cause him to suffer any drug relapse. Concluding that petitioner had demonstrated by clear and convincing evidence that he was rehabilitated, that he possessed the present moral qualifications for readmission, and that he had the requisite learning and ability in the general law, the hearing judge recommended petitioner's reinstatement to the practice of law. The State Bar here seeks review of that decision and recommendation.

II. Discussion

A. Requirements for Reinstatement

Although petitioner resigned with disciplinary charges pending, he must meet the same requirements for readmission as if he were disbarred. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092.) In order to be reinstated, petitioners must pass a professional responsibility examination, establish present ability and learning in the law, and demonstrate their rehabilitation and present moral qualifications. (*In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 673.) To prove rehabilitation, "a petitioner needs to show a recognition of his or her wrongdoing . . . ." (*id*. at p. 674), as well as proof of sustained exemplary conduct since his resignation. (*In the Matter of Bodell* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 459, 468.)

B. Learning and Legal Ability

It is undisputed that petitioner satisfied in November 2002 the requirement that he pass a professional responsibility exam. The parties stipulated, and the hearing judge found, that

petitioner has demonstrated requisite learning and ability in the law. Based on our review of the record, we adopt the hearing judge's finding.

C. Petitioner's Burden of Proof Regarding Rehabilitation and Moral Qualifications

Petitioner bears a heavy burden of proving his rehabilitation and fitness for practice. (*Hippard v. State Bar, supra,* 49 Cal.3d at p. 1092 [a petitioner "must show by the most clear and convincing evidence that efforts made towards rehabilitation have been successful."]; *Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547 [" ' "[O]verwhelming, proof of reform" ' " is required].) Moreover, petitioner's evidence of present character must be considered in the light of his prior misconduct, which in this case was very serious. (*Tardiff v. State Bar, supra*, 27 Cal.3d at p. 403; *In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546, 553.) However, the law favors rehabilitation, and even egregious past misconduct does not preclude reinstatement. (*In the Matter of Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 316.)

We have independently reviewed the record, and reweighed the evidence in order to pass on its sufficiency. (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. Rptr. at p. 315.) Nevertheless, we have given the hearing judge's determinations of testimonial credibility great weight because she saw the witnesses and observed their demeanor. (*Ibid*.) Since petitioner presented no medical or expert evidence supporting his course of recovery and the State Bar offered expert testimony in rebuttal, the credibility determinations of the hearing judge are particularly important in this case because "[r]eformation is a state of mind which 'may be difficult to establish affirmatively' and 'may not be disclosed by any certain or unmistakable outward sign.' [Citation.]" (*Ibid*.) The hearing judge clearly believed petitioner's testimony and found that the testimony of critical character witnesses corroborated his testimony. On this record, we are not presented with a sufficient basis to overturn the hearing judge's findings of fact with respect to the testimonial evidence offered by petitioner. That leaves us with the task

of determining if the quality and quantity of petitioner's evidence are sufficient to meet his heavy burden of proof. (*Ibid*.)

D. Petitioner's Evidence

1. Good Character Witnesses

The hearing judge found petitioner's favorable character witnesses "demonstrate Petitioner's rehabilitation and good moral character." We agree. Although " 'character testimony, however laudatory,' does not alone establish the requisite good character" (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939), we have nevertheless observed that "in determining whether an erring attorney has proved rehabilitation and present moral qualifications, the California Supreme Court has heavily weighed 'the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living' of such an attorney. [Citations.]" (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 317-318.)

Nine character witnesses testified on petitioner's behalf. All were aware of the serious nature of petitioner's misconduct, his imprisonment and his underlying substance abuse. They uniformly attested to petitioner's good character and honesty. Most of these witnesses "gave specific, convincing reasons for holding favorable opinions of petitioner's rehabilitation or present moral fitness." (*In the Matter of Bodell, supra*, 4 Cal. State Bar Ct. Rptr. at p. 465.) Many of the witnesses had long-term as well as current knowledge of petitioner. For example, Frederick Schroeder, who was the District Attorney for Yuba County who filed the charges resulting in petitioner's imprisonment and is currently the assistant district attorney for Sutter County assigned to drug court cases, has known petitioner for approximately 25 years. He tried a number of cases against petitioner and found him to be an excellent attorney, albeit surly and abrasive. After petitioner's release from prison, Mr. Schroeder repeatedly interacted with

petitioner at the local grocery and at social occasions and was struck by the stark change in petitioner who was no longer hostile but very pleasant instead. Mr. Schroeder testified that as a prosecutor for twenty-nine years, he has observed that approximately 95 percent of those committed to prison from his area are drug users addicted to methamphetamine and that the recidivism rate is very high. He has sent friends to jail and noticed that, for some, incarceration has not changed them at all. Mr. Schroeder does not believe that petitioner falls into that category of individuals and truly believes petitioner learned from his prison experience and has changed to become an individual of good moral character who no longer takes illegal drugs.

Steven Roper, the Chief Probation Officer for Yuba County who approved the probation department's prison recommendation for petitioner's embezzlement conviction, has known petitioner for 25 years, interacting with petitioner professionally when petitioner's clients were being investigated and socially at PTA meetings, school plays and little league events. Between 1988 and 1993 Mr. Roper would see petitioner a minimum of one night per week. Like Mr. Schroeder, Mr. Roper has firsthand knowledge of the facts surrounding petitioner's misconduct and imprisonment. Although he firmly believes petitioner deserved to be imprisoned for his embezzlement and probation violation, he acknowledges that petitioner has taken full responsibility for his misdeeds. Based on his observations of petitioner, Mr. Roper believes that, since his release from prison, petitioner is on the path to recovery and has not relapsed.

Kathleen Burgess is Chief Deputy County Counsel for Yuba County and petitioner's wife. Ms. Burgess married petitioner in 1976, but separated from him in 1986 and eventually divorced him in 1987. She is intimately familiar with petitioner's misconduct and has experienced firsthand the suffering caused by petitioner's drug addiction. After petitioner confessed to her that he was a drug addict, she was able to associate his behavioral traits such as his short-temper with the children, unreliability, and volatile irritability with his use of controlled substances. Because of their shared custody of the children, Ms. Burgess has continually

observed petitioner since his prison release and believes petitioner is a changed man. Unlike his behavior before imprisonment, she noticed that petitioner is now reliable, sensitive to others, engaging and funny, and able to discuss issues calmly. Since his release from prison, she has not noticed any behavior of petitioner that would indicate to her that he was using drugs. She remarried petitioner in 1993 and testified that she would not have done so if she had any suspicion that petitioner was using drugs or in danger of relapsing. She believes petitioner to be a moral person and is convinced that his problem with drugs is a thing of the past.

The Honorable James L. Curry, the Presiding Judge of the Yuba County Superior Court, has known petitioner for over 20 years. Judge Curry has been on the bench since January 1997 primarily handling criminal cases. Before becoming an attorney, he was a probation officer. Early in their legal careers, Judge Curry would see petitioner at least once weekly due to their respective criminal law matters. Judge Curry is familiar with petitioner's substance abuse and subsequent misconduct. After petitioner's release from prison, Judge Curry became reacquainted with petitioner through petitioner's volunteer work with little league and juvenile hall. He has observed petitioner candidly discuss with at-risk youth his former drug problem, his theft of client funds and subsequent imprisonment and recognizes the difficulty involved in openly discussing such matters. Judge Curry believes that over the years he has developed the experience to observe signs indicative of drug abuse and based on his observations believes that petitioner is no longer engaged in such conduct. He would not support petitioner's reinstatement if he thought it was likely that petitioner would do anything to embarrass the local bar again.

Petitioner's current and former employers, three of whom were attorneys, attested to petitioner's excellent work habits. None of them observed behavior in petitioner that they would associate with drug use or alcohol abuse. One employer found petitioner so trustworthy that he provided petitioner an office key within two months of hiring petitioner, and another employer

entrusted petitioner with fiduciary responsibilities.[10] Although evidence that petitioner occupied positions of trust is not a requirement of reinstatement, where evidence about the manner in which a petitioner has handled positions of trust is available, such evidence is of probative value. (*In the Matter of Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 319.)

Favorable testimony from members of the bar and members of the public held in high regard is entitled to considerable weight. (*In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 431.) Accordingly, we give significant weight to the testimony of judges and officers of the court because "[t]hese witnesses have a strong interest in maintaining the honest administration of justice." (*In the Matter of Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 319.) The State Bar did not present rebuttal evidence to the favorable good character references. But, as noted *ante*, even this quality and quantity of favorable character evidence is not itself determinative of petitioner's rehabilitation. (*In the Matter of Salant* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 1, 5.) We accordingly look to other factors as indicia of petitioner's rehabilitation and present moral character.

2. Community Service

We agree with the hearing judge's findings that petitioner has engaged in community service activities which aid his rehabilitative showing. Petitioner has devoted significant time volunteering his services to the youth of his community and has worked extensively with the Marysville Little League from 1988 through 1993. Additionally, since 2002, petitioner has led and coordinated guest speakers for weekly discussions designed to steer at-risk juvenile offenders away from further criminal conduct. At these weekly sessions petitioner candidly

[10]Craig Thurber, the former California operations manager for Menasha Corporation testified that, as an administrative manager between 1996 to 2001, petitioner was responsible for the company's accounts receivable and accounts payable and had sole responsibility to authorize payments for the company's California operation.

discusses the fact that he is a felon who stole money from a client to support a drug habit which resulted in his imprisonment.

3. Recovery from Substance Abuse

The State Bar argues that petitioner failed to establish his rehabilitation from his methamphetamine addiction. We disagree. Petitioner's testimony that he has not used methamphetamine since January 1987 was uncontroverted. Without hesitation, petitioner acknowledged his methamphetamine abuse, which he has worked diligently to overcome. Although petitioner suffered a relapse after initially completing a drug rehabilitation program in early 1987, prior to imprisonment, he has since adhered to a personally developed recovery program which combines exercise with elements of A.A.'s "Twelve Steps" to recovery and A.A. attendance as needed. This program has successfully prevented any further drug relapse for over seventeen years. Although petitioner readily admits that he continues to drink alcohol once a week, there is no evidence that such use has ever caused petitioner to relapse into methamphetamine use or that petitioner abuses alcohol.[11]

The State Bar relies on *In the Matter of Kirwan* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 692 to support its argument that petitioner's failure to offer any medical or other expert opinion attesting to his recovery and prognosis necessarily renders petitioner's evidence of rehabilitation insufficient. In *Kirwan*, the petitioner's showing of recovery from a history of alcohol abuse persisting since adolescence rested entirely on his own efforts at abstinence for approximately seven years as supplemented by the favorable testimony of only a few favorable character witnesses. Further, the petitioner never participated in any professional substance

[11]Witnesses who have observed petitioner drink stated that they have never seen petitioner inebriated. In fact one witness testified that at a Super Bowl party where each table had a keg of beer, petitioner was the only person the witness observed abstaining from alcohol and drinking only bottled water. On the other hand, the State Bar presented no evidence that petitioner suffered any criminal arrest, conviction, job loss, marital dissolution, or other negative consequence associated with petitioner's alcohol consumption.

abuse treatment program or any supporting recovery program since he felt he did not need any therapy or outside program to refrain from drinking. (*id*. at pp. 698-700.) We believe petitioner's facts are substantially distinguishable from those in *Kirwan*. Unlike *Kirwan*, petitioner has participated in a professional in-house substance abuse treatment program, has participated in after-care group therapy before and after his incarceration, has maintained ongoing, although sporadic, participation in A.A., and supplemented his showing of recovery with favorable testimony from several, critical character witnesses. Importantly, unlike the petitioner in *Kirwan*, petitioner did not downplay the importance that therapy plays in a successful recovery program or indicate that he did not need any therapy or an outside program to control his substance abuse. For these reasons as well as others discussed, *post*, the State Bar's reliance on *Kirwan* is unpersuasive.

Petitioner's dedication to his personalized recovery program has given him the ability to competently and punctually complete his work, manage financial and other fiduciary duties as an administrative manager, take care of his health and foster his personal relationships, all of which suffered due to his drug abuse. These fundamental changes in his values and life-style have allowed petitioner to deal with stresses in life, such as the loss of his daughter, and minimize the risk of relapse.

The State Bar also argues on review that its expert witness rebutted petitioner's showing of rehabilitation. We disagree. Prior to trial, the State Bar's expert in the area of addiction medicine and addiction recovery reviewed petitioner's deposition and a criminal probation report but never evaluated petitioner.[12] The State Bar's expert did not specifically testify as to whether petitioner's behavior with alcohol was addictive or whether petitioner is still suffering from drug addiction. Despite the absence of an evaluation, the State Bar's expert opined that petitioner is

[12]We shall discuss, *post*, the State Bar's motion for an independent medical evaluation of petitioner.

not in the process of recovery from the point of view of a 12-step recovery program because petitioner does not attend N.A. meetings and continues to drink alcohol. He also believes petitioner is actually in relapse due to his use of alcohol, a mood-altering substance.

We are not inclined to adopt such a broad definition of relapse particularly since there is no evidence that petitioner has a history of alcohol abuse. Furthermore, such a broad definition would be of little assistance in the context of reinstatement proceedings because a recovering substance abuser petitioning for reinstatement would always be in relapse, for example, if he continued to smoke cigarettes or drink coffee -- habits which involve ingesting the mood-altering substances of nicotine and caffeine. Since we find no evidence in the record that petitioner expressed disdain of, or unwillingness to pursue a more traditional program of recovery,[13] we do not conclude that his decision to forego N.A. meetings detracts from his overall showing of rehabilitation and find credible his rationale for attending A.A. meetings instead.

Rather than lower the persuasiveness of petitioner's evidence, we find that the expert's testimony aids petitioner's showing of rehabilitation. The State Bar's expert testified that there are several ways of recovering from a drug or alcohol problem, and, theoretically, an individual could personally develop a completely eccentric form of recovery program which successfully allows the person to recover from substance abuse. In situations involving such self-help recovery programs, the State Bar's expert believed that others should be able to test the program to ascertain whether it truly is working. The State Bar's expert further testified that recovery can be achieved by involvement in a program that requires honesty, self-disclosure, reality checking with peers and self-evaluation of character flaws. We find that petitioner's personal recovery program satisfies these requirements since he has disclosed the details of his misconduct to multiple employers and continues to candidly disclose, on a weekly basis, the details of his drug

[13]On the other hand, it appears that petitioner's development of his own recovery program stems from the fact that he was incarcerated at the time he initiated it and only had gym facilities and his prior knowledge of the 12 steps at his disposal.

abuse, theft, and incarceration to juvenile offenders. Petitioner has a means of reality checking through his wife and family as well as the group members who attend A.A. in Marysville. Additionally, petitioner has completed a moral inventory and self-evaluation on a daily basis. These facts combined with petitioner's nearly 17-year abstinence from methamphetamine use are sufficient to overcome any concern raised by the absence of independent medical or psychological testimony regarding petitioner's recovery from methamphetamine addiction.

The State Bar's concerns over the uniqueness of petitioner's recovery efforts would be more persuasive in a case where only a few years had passed after disbarment or resignation. In this case, however, the State Bar's persistent refusal to acknowledge the adequacy of petitioner's efforts at rehabilitation is not only unmeritorious but fails to recognize the diversity of human experience tested by the critical witnesses in this case.

Indeed, the State Bar's expert stated that a methamphetamine addict is less likely to relapse after 16 years of abstinence than after five years of abstinence and acknowledged that petitioner's extended period of abstinence from methamphetamine use, the absence of subsequent misconduct, and continued gainful employment all evidence rehabilitation. We agree. The passage of an appreciable period of time is an appropriate consideration in determining whether a petitioner for reinstatement has made sufficient progress towards rehabilitation. (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 316.) Moreover, we are particularly mindful of the fact that petitioner's sustained period of exemplary conduct and abstinence from drugs exceeds by eightfold the benchmark period of two years' abstinence used by behavioral professionals as a persuasive indicator of recovery. (*In re Leardo* (1991) 53 Cal.3d 1, 7-8.)[14] Furthermore, petitioner's acknowledgment of his drug abuse, his commitment to abstinence, and his active and regular participation in his personal recovery program that

[14]This is not to say that a future petitioner recovering from substance abuse need only surpass this benchmark, with evidence of nothing more, in order to establish rehabilitation.

incorporates tenets of A.A.'s "Twelve Steps" to recovery coupled with occasional A.A. attendance positively reflect his sustained rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368.) We conclude that petitioner's nontraditional recovery program and the absence of independent medical or psychological evidence regarding petitioner's recovery from methamphetamine addiction do not outweigh petitioner's clear and convincing proof of rehabilitation and sustained exemplary conduct over an extended period of time.

4. Restitution

The State Bar argues that petitioner had the financial means to pay the Client Security Fund (CSF) much earlier than four months before filing his petition for reinstatement and that this evidences petitioner's lack of rehabilitation. We disagree. The parties stipulated, and the hearing judge found, that in February 1989 the Client Security Fund was directed to reimburse $22,341.47 to the conservator for Bryan T. Poe. In April 1989 that amount was reduced to $9,833.42 in recognition of petitioner's restitution of $12,508.05 to the conservator. Petitioner paid all sums owed to the CSF in August 2002, almost four months before filing his petition for reinstatement. We adopt the hearing judge's findings and note that at trial the State Bar did not develop any evidence regarding petitioner's ability to pay restitution after his prison release but instead merely argues on appeal that petitioner's gainful employment and his joint tax returns clearly show he had the ability to pay CSF as early as 1999.

"[R]estitution is neither mandatory, nor in and of itself determinative of rehabilitation. [Citation.] Applicants for reinstatement are to be judged not solely on the ability to make restitution, but by their attitude toward payment to the victim. [Citations.]" (*In the Matter of Distefano, supra*, 1 Cal. State Bar Ct. Rptr. at p. 674.) Although we cannot determine from this record whether petitioner truly had the financial means to pay CSF much earlier, the record is far more clear and convincing with respect to petitioner's attitude toward the importance of restitution. Even before CSF was ordered to pay the conservator, petitioner had already reduced

the amount owed by $12,508.05. This, coupled with petitioner's full reimbursement to CSF for the claim it paid to his client, adequately demonstrates a proper attitude and sincerity toward restitution. (*In re Andreani* (1939) 14 Cal.2d 736, 750.)

5. Noncompliance with Rule 955

Effective December 19, 1986, the Supreme Court ordered petitioner to comply with rule 955 of the California Rules of Court.[15] At the time, petitioner had only two clients and arranged for other attorneys to handle the clients' matters; however, petitioner never filed a 955 affidavit. Petitioner's non-compliance is problematic since the failure to comply with rule 955 may be a ground for denial of reinstatement. (*In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 227.) Rule 955(d) provides "A disbarred or resigned member's willful failure to comply with the provisions of this rule constitutes a ground for denying his or her application for reinstatement or readmission."

The hearing judge excused petitioner's noncompliance with rule 955 without explanation. Other than petitioner's belief that he might have been incarcerated at the time he was required to comply with rule 955, his testimony offers little insight as to why he continued to fail to file a rule 955 affidavit.

Although the record indicates that petitioner's noncompliance with rule 955 was wilful, this fact alone would not require denial of his reinstatement. As the Supreme Court has observed, to so conclude "would effectively foreclose petitioner from ever being readmitted regardless of the showing of rehabilitation otherwise made. The violation occurred more than 10 years ago, and does not appear to have caused any injury to clients or to have significantly impaired the State Bar's disciplinary proceedings against petitioner." (*Hippard v. State Bar*,

[15]Unless otherwise noted, all further references to "rule 955" are to rule 955 of the California Rules of Court.

supra, 49 Cal.3d at pp. 1096-1097 [denying reinstatement on other grounds].) Similarly under petitioner's facts, the rule 955 violation occurred over 18 years ago, petitioner had only two cases pending at the time of his resignation, he made arrangements for other attorneys to take over the clients' matters, and there is no evidence that the violation either injured clients or impaired any disciplinary proceedings against petitioner. Given the other strong evidence of rehabilitation, we find that noncompliance with rule 955 under these facts is not determinative of petitioner's rehabilitation.

E. The Hearing Judge Did Not Err in Denying the State Bar's Request for an Independent Medical Examination

The State Bar requested the hearing judge to order petitioner to submit to an independent medical examination by a physician certified in addiction medicine to evaluate whether petitioner has any current unresolved addictions or whether there was any likelihood of relapse. The State Bar cited as good cause for its request the fact that petitioner continues to consume alcohol.[16] Finding that the State Bar's evidence was insufficient to require such an examination, the hearing judge denied the State Bar's request.

Generally, the standard to apply to the review of a discovery order on appeal is abuse of discretion. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695.) As mentioned, *ante*, our review of the record reveals no evidence that petitioner presently abuses

[16]Rule 184(b) of the Rules of Procedure of the State Bar of California provides in part: "In any proceeding in which the mental or physical condition of a member is at issue, and to the extent that discovery is permitted by rule or order of the Court: [¶] (1) The State Bar may move for an order requiring the member who is the subject of the proceeding to undergo a mental and/or physical examination pursuant to Business and Professions Code section 6053. The motion and supporting evidence must demonstrate that there is good cause to require the examination. . . . [¶] . . . . [¶] (d) The Court may hold a hearing to determine whether the need for the examination outweighs the member's right to privacy. If so, appropriate limitations or conditions should be included in the order so as to minimize the intrusiveness of the examination. . . ."

alcohol, or suffered from a previous alcohol addiction. Further, there is no evidence that petitioner used any illicit drug since January 1987 or that his present consumption of alcohol caused any relapse into drug use. Accordingly, we conclude that the hearing judge did not abuse her discretion in denying the State Bar's request.

Moreover, although the State Bar may seek an independent medical examination in reinstatement proceedings, it is important to recall, as we noted *ante*, that petitioner has the burden of proving by clear and convincing evidence that he meets all the requirements for readmission to the practice of law. This contrasts with a disciplinary proceeding in which the State Bar bears the burden of proof. Since petitioners have the heavy burden of proof in reinstatement proceedings, they are looked upon to amass and present the evidence necessary to sustain their evidentiary burden. Thus, petitioners failing to introduce expert evidence or an independent evaluation, when it appears to be important, bear the risk of failing to sustain their evidentiary burden.

III. Conclusion

Having viewed the evidence in its totality, we conclude that petitioner's showing is sufficient to warrant reinstatement by the Supreme Court. Petitioner offered impressive evidence of his rehabilitation and present moral character. The evidence of his present ability to practice law is equally impressive. Moreover, "[a]bundant critical witnesses established petitioner's success in overcoming the weaknesses that led to his earlier . . . behavior and showed his success in establishing himself . . ." as a competent paralegal, caring husband and father and as an important contributor to his community. (*In the Matter of Bodell, supra*, 4 Cal. State Bar Ct. Rptr. at p. 468.) Although the record contains an infirmity due to petitioner's noncompliance with rule 955, we have recommended reinstatement in other cases where there have been similar, isolated weaknesses in the evidentiary showings. (Cf. *In the Matter of Salant, supra*, 4 Cal. State Bar Ct. Rptr.1 [failure to comply with rule 955 until seven years after disbarment not a bar

to reinstatement]; *In the Matter of Miller, supra*, 2 Cal. State Bar Ct. Rptr. 423 [petitioner's failure to be forthcoming with his clients about the circumstances of his resignation, suggesting to them that he was retiring and concealing his discipline was not a bar to reinstatement]; *In the Matter of Rudman, supra*, 2 Cal. State Bar Ct. Rptr. 546 [DUI conviction after resignation not a bar to reinstatement].)

The hearing judge who presided over the trial in this proceeding concluded that petitioner had made the very high showing which reinstatement demands. We agree.

IV. Recommendation

For the foregoing reasons, we therefore recommend that Mark Hamilton Salyer's petition for reinstatement be granted and that he be reinstated as an active member of the State Bar of California upon his paying the required fees (Bus. & Prof. Code, § 6063) and upon his taking the oath of an attorney at law. (Bus. & Prof. Code, § 6067).

STOVITZ, P. J.

We Concur:

EPSTEIN, J.
WATAI, J.